IN THE MATTER OF THE PETITION OF RIGHT OF

JOHN RUDOLPHUS BOOTH..... SUPPLIANT;

1913
Feb 13.

AND

HIS MAJESTY THE KING..... RESPONDENT.

Indian lands—License to cut timber—Contract for renewal of license—Regulations by the Governor in Council—Validity—R.S.C., 1886, chapter 43, sections 54 and 55—Construction.

By section 54 of chapter 43, Revised Statutes of 1886 (*The Indian Act*) it is provided as follows: "The Superintendent-General or any officer or agent authorized by him to that effect, may grant licenses to cut trees on reserves and ungranted Indian lands at such rates and subject to such conditions, regulations and restrictions as are from time to time established by the Governor in Council, and such conditions, regulations and restrictions shall be adapted to the locality in which such reserves or lands are situate." Section 55 provides that no license shall be granted for a longer period than twelve months from the date thereof.

Held, that the Superintendent-General, or other officer authorized by him to that effect, had no power to grant a license for a longer period than twelve months from the date thereof.

2. That the Superintendent-General or other officer of the Crown, had no authority under the Act to make a contract either as embodied in the license, or *dehors* the same, binding the Crown to grant a renewal, or a new license from year to year.

3. That the conditions, regulations and restrictions referred to in section 54 of the Act [now sec. 73 of chap. 81, R. S., 1906] only refer to such conditions, regulations and restrictions as are applicable to the license limited by the statute to the period of twelve months, and would not extend to regulations which would contemplate, or attempt to provide for a renewal of the license to a period beyond the twelve months so limited by the statute.

4. That there is nothing in the Act compelling the Crown for all time to keep lands set apart as timber berths, if, in its discretion, it is considered advisable to sell the same in the interest of the Indians to whom it stands in the relation of trustee in respect of such lands.

Contois v. Bonfield (27 U. C. C. P. 84); *Muskoka Mill and Lumber v. McDermott* (21 O. A. R. 129); *Smylie v. The Queen* (31 O. R. 203); 27 O. A. R. 176); and *Bulmer v. The Queen* 3 Ex. C. R. 184; 23 S. C. R. 488, considered.

PETITION OF RIGHT to restrain the sale of certain Indian lands containing timber limits to which

1913

BOOTH
v.
THE KING.

Argument of Counsel.

the suppliant asserts a claim, and for a declaration of certain rights enuring to the suppliant.

The facts are fully stated in the reasons for judgment.

January 16, 1913.

The case came on for hearing at Ottawa before Mr. Justice Cassels.

G. F. Shepley, K.C., and *A. C. Hill* for the suppliant ; *F. H. Crysler*, K.C., for the respondent.

Mr. *Shepley*, in support of the petition of right, presented the following argument:—

The action concerns the dealing of the Crown with a timber limit carved out of the Indian reserve on the north shore of Lake Nipissing. This was under license to Mr. Booth for a great many years, but as to which, in the year 1909, the Government declined to grant any further license—contrary, as we say, to the terms of the statutes and regulations—the conditions of the license theretofore existing having been fully complied with. The action is for the purpose of having the respective rights of the parties determined in that respect.

There is also a counter-claim.

The nature of the counter-claim is this: In the first license to us, which has been kept on foot by renewals having the force of fresh licenses from year to year until 1909, the suppliant was entitled or empowered to cut all the timber, to be not less than a certain diameter on the stump, nine inches, I think, upon the limit. What the Crown says is that from year to year timber which, in October 1891, was not yet of nine inches in diameter, having since become of nine inches in diameter has been improperly cut; the Crown seeking to confine the right to cut these to

such trees as were in 1891 of the diameter of nine inches.

[THE COURT.—I only want to know what the contest is about. You claim damages if there is a breach of the contract?]

What I claim is a judgment upon the point, and I have always supposed that the Crown will respect a judgment of the Court although no formal order is issued. The limits were advertised for sale, and we want to stop that.

[THE COURT.—Your remedy would be damages. You could not get specific performance.]

Probably we could not get specific performance against the Crown, and I do not know that we are so much concerned with the damages if the Crown will let us go on and have our rights according to the statutes, as we construe them, and the license issued under them, and the regulations upon which they have been issued.

[THE COURT.—The Crown by their defence admit that they refused to renew. The only point there might be in the latter is this: I notice in the statement of defence, the Crown says in point of fact there was no pine timber on the limit.]

They say there is not much pine. I suppose this suit is probably some evidence that we do not agree with that, but I do not suppose your lordship will be troubled with that. There is no doubt pine enough to make it necessary or advisable for us to bring this suit and Mr. Booth is here; if it is thought necessary I will ask Mr. Booth whether there is any more timber or plenty of timber there yet, but I suppose my learned friend and I will take that for granted. We are not here to dispute about nothing.

1913

BOOTH v. THE KING.

Argument of Counsel.

[THE COURT.—It is said that all the timber that was subject to the license has been cut and taken away.]

That is the point my learned friend wants to argue, that there was no right to the growth of the trees, that we were bound never to cut any tree that at the date of 1891 was not more than nine inches in diameter.

Mr. *Chrysler*.—In order that my learned friend may not be misled on the point as to whether there is pine timber there or not, of course I suppose there is some, but if the Crown has no discretion it does not matter; if Mr. Booth is entitled to a renewal of the license forever, of course it does not matter whether there is pine timber there or not. But if the right to renewal of the license is dependent upon the existence of pine timber, then a further question arises. I mean if it terminates by reason of the subject-matter of the license having ceased to exist, that is another event that is possible.

[THE COURT.—How do you propose to deal with it? Supposing in point of fact there was no more timber on the limit at all in 1909, then of course there was no value at all. Then how do you propose to deal with it if it comes down to the question of damages, in the alternative? I could not give a decree of specific performance against the Crown; I could only declare that Mr. Booth was entitled to the renewal, and if the Crown refused to grant a renewal, then it would be a question of reference as to the damages?

Mr. *Shepley*.—Quite so.

[THE COURT.—It would have to be adjusted in that way. But if the defence is intended to be pressed that in point of fact in 1909 there was no timber there at all, there was nothing to grant if that is the effect of that claim.]

1913

BOOTH v. THE KING.

Argument of Counsel.

Mr. *Chrysler*.—I would not put it that high, my lord, because I understand there is pine timber there, but I am coming to the next stage, merely for the purpose of indicating what is in dispute between us. We do say and our view is that the limit, the property, has reached the point at which it is no longer reasonable to allow it to be the subject matter of a timber license; it is land that should be opened for settlement.

And if there is any timber on it, it is scattered and not in such quantities that it is reasonable to tie up one hundred and eight square miles of property from the use of the public.

[THE COURT.—The question of reasonableness is a matter that has no bearing if in point of fact there is a contract. But it might be very important if there is no pine timber on it, but you are willing to admit that there was in 1909 pine timber?]

Mr. *Chrysler*.—Some. The mass of it had been cut.

Mr. *Shepley*.—I want to be sure that I quite understand. It is probably sufficient for the purpose of this litigation if it is admitted that there was pine timber there which was merchantable and which would form a property to which if we are otherwise entitled it was desirable we should continue our title. But if my learned friend is going to say I have not proved that there was a lot of merchantable pine there I would call Mr. Booth and put an end to it, because if there is not any merchantable pine we would not have brought this litigation, if we did not think so.

[THE COURT.—As I understand, Mr. *Chrysler* says he is willing to admit that there is merchantable pine timber there, but that there is so little of it that it was reasonable for the Crown to break their contract, if there was a contract.]

1913

BOOTH v. THE KING.

Argument of Counsel

Mr. *Chrysler*.—Or to exercise its right to refuse any further renewal.

[THE COURT.—If they had that right.]

Mr. *Chrysler*.—It has some bearing perhaps upon the construction. You see, my lord, it is part of the argument that I will offer, whether you could give such a construction to the statute that it will mean that so long as one pine tree remained upon that limit the Crown is bound to renew.

Mr. *Chrysler*.—It is a question then of degree, and the question upon that is, who is to have the discretion? Is it in the discretion of Mr. Booth to go on as long as he thinks it profitable and demand a renewal, or has the Crown no discretion to say the time has arrived when this property should be thrown open for settlement notwithstanding the fact that there is a small quantity of scattered pine remaining on it.

We of course contend that the right of the Crown is absolute to refuse a renewal.

Mr. *Shepley*.—That is what I prefer to meet and discuss, rather than in this litigation to discuss the propriety of the ground upon which you acted.

[THE COURT.—I suppose it ought to be conceded, if it is the fact, that there is pine timber there which Mr. Booth would have cut had the license been renewed?]

Mr. *Chrysler*.—I think so.

Mr. *Shepley*.—Then I propose to refer to the legislation in force from time to time, and the regulations of the Department accompanying the legislation from time to time, calling attention at the proper moment to the legislation which was actually in force in 1891, when the first license was given, and to the regulations which were then in force and to the alterations which had been made from time to time since.

Of course there was legislation existing earlier, but I do not think my learned friend will say we need go further back than I propose to go.

Mr. *Shepley*.—I am going back to the Act 43 Victoria, 1880.

In order to appreciate and understand that I refer then first to the Dominion Statute of 1880, which is 43 Victoria, chapter 28, an Act respecting Indians. And so as not to burden the record, I refer only to a few sections as indicating the policy of the legislature so far as the matters which we are discussing now are concerned. (Cites sections 40, 56, 57 and 58 of 43 Victoria, chapter 28.)

That is all I need to refer to at this moment. That statute was amended by 44 Victoria, chapter 17, being An Act to amend the Indian Act, 1880. And I refer there only to the first section, because I think it will become important in the argument: "The Governor in Council may make such provisions and regulations as may from time to time seem advisable for prohibiting or regulating the sale, barter, exchange or gift by any band or irregular band, in the North West Territories, the Province of Manitoba or the District of Keewatin," etc. Then, "All provisions and regulations made under this Act shall be published in the *Canada Gazette*." That requires publication, as I read it, of the regulations made under the Act, in the *Canada Gazette*.

Then I come next to the statutes of 1883, 46 Victoria, chapter 6.

That I refer to as indicating that the management of the Indian lands—a trust, of course, in the broad sense—is put by Parliament entirely into the hands of the Superintendent-General of Indian Affairs subject to the regulations which may be devised from time to time.

1913

BOOTH v. THE KING.

Argument of Counsel.

Then I come to the revision of 1886, and I shall refer to two statutes in that with the purpose which I shall point out to your lordship when I come to the second. The Indian Act was consolidated as chapter 43 of R.S.C. 1886.

Practically, with some little modifications which are perhaps not important, they are recapitulations or consolidations of the provisions to which I have already referred.

Section 4, for instance, gives the Superintendent-General of Indian Affairs the control and managment of the lands and property of the Indians, in the fullest possible language. Then section 54 gives power to grant licenses subject to the conditions, regulations and restrictions established by the Governor in Council, and provides further, as the earlier statute did, that these conditions are to be adapted to the locality in which the reserves or lands are situated.

Then 55 limits the length of any license to a year, and repeats the provision as to any error in the license making it extend to lands which ought not to have been covered.

Then 56 as to the description of the trees and the kinds of trees to be in the license, and as to the title to the cut trees.

Then I pass to section 131 which requires that all the renewals made under this Act shall be published in the *Canada Gazette*.

So that I think we have now the legislation in the shape in which it was at the time of the granting of the first license which your lordship is asked to consider here.

[THE COURT.—Was there any change subsequently by legislation affecting the question at all?]

There are two amending statutes before the legislation of 1906, which I have here and which I want to call attention to because something may turn upon them. But first I would point out to your lordship, the order in council of 12th January, 1888 (See Dominion Statutes, 1888, page lxxxviii), in this are found the regulations containing provisions that license holders who comply with all the existing regulations shall be entitled to have their licenses renewed on application to the Superintendent-General of Indian Affairs, and the form of the license is given.

Then, the next statute I refer to is 57–8 Victoria, 1894, chapter 32, and the only section I refer to in that is section 12, which introduces a new provision which I think of considerable importance:—

"All regulations made by the Governor in Council under this Act shall be published in the *Canada Gazette* and shall be laid before both Houses of Parliament within the first fifteen days of the session next after the date thereof."

There for the first time we find the provision requiring the Government after the passing of an order in council fixing regulations for the disposal of the Indian Reserves, to lay the regulations before both Houses of Parliament.

That is one of the points on which I lay some stress. With regulations of the kind laid before Parliament, in the face of Parliament, Parliament has not only failed to check the regulation in any way or to dispose of it, but has let it pass by and has passed other legislation *in consimili casu*, referring distinctly to this very power of renewal. There is not only the absence of any want of approval on the part of Parliament of the regulations which have been established under the provisions of an Act of Parliament, and

1913

BOOTH v. THE KING.

Argument of Counsel.

which were to be laid before Parliament, but there is also as I shall now proceed to point out, distinct legislation upon the subject of renewals recognizing the practice in legislation which is, as I have said, *in consimili casu.*

First I come to the consolidation of the *Indian Act.* in chapter 81 of the revision of 1906; and there I refer to section 4, as to the powers of the Superintendent-General, sections 73 and 74, as to the granting of licenses, and section 170, which makes the provision that all regulations made by the Governor in Council shall be published in the *Canada Gazette* and shall be laid before both Houses of Parliament within the first fifteen days of the session next after the date thereof.

Then the legislation *in consimili casu* your lordship will find in the *Dominion Lands Act.* Now let me point out the sections I am going to refer to in this Act. The *Dominion Lands Act* (R.S. 1906, c. 55) refers of course to the public domain which is not in the Indian Reserves, and deals with their management and control.

In section 170 we find that the Governor in Counci may from time to time, (*a*) "Order that leases of the right to cut timber on certain timber berths defined in the Order"—this is of course of the public lands other than Indian lands—"shall be offered at public auction, at an upset bonus fixed in the Order, and awarded to the person bidding, in each case, the highest bonus therefor, such bonus to be paid in cash at the time of sale;" (*b*). "Authorize the lease of the right to cut timber on any timber berth to any person who is the sole applicant for such lease, the bonus to be paid by such applicant to be fixed in the Order authorizing the lease to him, and to be paid in cash at the

time of its issue;" (*c*) "Authorize the Minister, when one or more persons apply for the right to cut timber upon the same berth, to invite tenders from the applicants or the public, and the lease shall be awarded to the person tendering the highest cash bonus therefor.' Then it is enacted by section 171:—"Leases of timber berths shall be for a term not exceeding one year; and the lessee of a timber berth shall not be held to have any claim whatever to a renewal of his lease unless such renewal is provided for in the Order in Council authorizing such lease, or embodied in the conditions of sale or tender, as the case may be, under which it was obtained."

I direct your lordship's attention to that.

[THE COURT.—But that statute does not apply to this land.]

No, my lord, it does not, but as I say it is a statute *in consimili casu*, recognizing regulations which have been in force from time to time and saying those regulations are not to apply to the public domain apart from Indian Reserves unless the right to renewal is expressly conferred by the order in council dealing with the lease itself. What right of renewal are they referring to? The right of renewal which has been from time immemorial exercised according to the regulations which Parliament has had before it from time to time.

The regulations of the 15th of September, 1888, were in force at the time of the granting of the first license to Mr. Booth.

[Mr. CHRYSLER.—Is there anything in the regulations that you referred to before, that is not repeated in these?]

I do not think so. I do not pretend to say that there is more in the former regulations than in these,

1913

BOOTH v. THE KING.

Argument of Counsel.

but those regulations were included in the statutes with the caption that I pointed out and I do not find that the regulations of the 15th September, which I am about to refer to now, were included in the statutes as bound up; and I want to have whatever advantage I am entitled to from the fact that in accordance with custom Parliament took these regulations, and without saying anything to indicate a want of concurrence in them, actually published them in the very volume of the public statutes. (He refers to secs. 5, 11, 12, 31 and 32 of the Regulations concerning timber licenses on Indian Reserves, Statutes of Canada, 1888, vol. 1, p. lxxxviii.)

Then section 32 I think is of the utmost importance. "Limit holders in order to enable them to obtain advances necessary for their operations shall have a right to pledge their lease as security without a bonus becoming payable. Such pledge in order to effect the limit against the debtor shall require to be noted on the back of the license by an authorized officer of the Department of Indian Affairs. But if the party giving such pledge should fail to perform his obligations towards his creditors, the latter on establishing the fact to the satisfaction of the Superintendent-General of Indian Affairs may obtain the next renewal in his or their own name subject to the payment of the bonus, the transfer being then deemed complete." I would also refer to section 33:—"Transfers of timber berths are to be in writing, and if not found objectionable by the Department of Indian Affairs are to be valid from the date on which they may be deposited in the hands of the latter, but no transfer is to be accepted while the party transferring is in default for non-payment of dues on timber to the Crown."

Now, taking section 32, what could be stronger—what could be more cogent—as indicating that the prime necessity, the essential quality, of all these transactions in one of the great assets of the people of the country is continuity of enjoyment in order that the most may be made, in the interest of the country, out of the public domain?

It is of the essence of the whole matter that when the Superintendent-General is empowered to make regulations governing these transactions, when he is empowered and required to make these regulations fit in with the locality and the necessities of the locality, he is not anywhere prevented from saying, when he grants a license to a man, if you keep this all in good order and perform all your conditions, at the end of your term we will give you another for another year. There is nothing prohibitive of that. All it says in the statute is that each license is to be for only a year.

The Superintendent-General is a trustee of these Indian lands. He is bound to make the very best of them in the interest of the Indians and the country. He is empowered to frame regulations, and he is directed to make those regulations fit in with the local conditions of the part he is dealing with. Then is he to be told you must only make your license for a year, at a time? And is he further to be told you must not only make your license for a year but you must never at the end of that year do anything with the man who at the time he took his license was necessarily, on the very frame of the regulations, conceived in the public interest, to have what I have ventured to call continuity of enjoyment?

The learned counsel then discussed the following cases:—

1913

BOOTH v. THE KING.

Argument of Counsel.

Attorney-General v. Contois (1); *Contois v. Bonfield* (2); *Booth v. McIntyre* (3); *Foran v. McIntyre* (4); *McArthur v. Northern Pacific Junction Ry.* (5); *Bulmer v. The Queen* (6); *Muskoka Lumber Co. v. McDermott* (7); *McArthur v. The Queen* (8); *Shairp v. Lakefield Lumber Co.* (9); *Smylie v. The Queen* (10).

Mr. *Chrysler*.—Citing the case of *Power v. Griffin* (11), argued that the authority of the Superintendent-General was to be sought in section 73.

Of the statute (R. S. 1906, c. 81), authorizing the action of the Superintendent-General, who may, it is said, grant licenses to cut trees. That is all we have to do with. The remainder of the section refers to other matters, but it is the simplest language possible. "The Superintenent General or any Officer or agent authorized by him to that effect may grant licenses to cut trees."

Then two lines of section 74 are all that have any application to this case. "No license shall be so granted for a longer period than twelve months from the date thereof."

Now it is common ground, I suppose, and my learned friend will not dispute the fact that we must find the authority for the alienation of these lands in those four lines. There is nothing there about the sale of anything. There is nothing there about any contract with regard to public lands.

The direct power to alienate—I am using that word in its largest sense—is limited. The Superintendent-General may "grant licenses to cut trees." It does not

(1) (1878) 25 Gr. 346.
(2) (1876) 27 U. C. C. P. 84.
(3) (1880) 31 U. C. C. P. 183.
(4) (1880) 45 U. C. Q. B. 288.
(5) (1890) 17 O. A. R. 86.
(6) (1893) 23 S. C. R. 488.
(7) (1894) 21 O. A. R. 129.
(8) (1885) 10 Ont. R. 191. [657.
(9) (1890) 17 O.A.R. 322; 19 S.C.R.
(10) (1899) 31 O. R. 202; 27 O.A.R. 172
(11) 33 S. C. R. 39.

1913

BOOTH v. THE KING.

Argument of Counsel.

say he may even sell the trees. He cannot sell the Indian lands under these sections. There are other sections which are applicable to that. He cannot contract with regard to the future sale of them. He can grant licenses, and that license is not to be granted for a longer period than twelve months, and, as my learned friend says, subject to the fact that he may make regulations.

Now we may look to the regulations and see if they in any way extend that. If they do I adopt the judgment of Mr. Justice Moss, the late Chief Justice of Ontario, as he was later, that the statute must govern. The important regulation is No. 5.

"License holders who shall have complied with all existing regulations shall be entitled to have their licenses renewed on application to the Superintendent-General of Indian affairs."

The Court will see in the cases that the earlier form—and the present construction is quite possibly that of the earlier form of the regulation, under the Upper Canada Act of 1849, which preceded these and upon which these regulations were framed—provided that the license holder, having complied with the existing regulations, should have the first right to renewal, as against all other applicants. That the construction placed on this by my learned friend should be given to it is I submit an extension which clearly puts it beyond the power intended to be conferred by the statute. That is to say, that the license holder shall be entitled in perpetuity from year to year to have the license renewed.

I put it in the opening of the case, in speaking of the evidence, if you analyze it does it mean that? Does it mean whether there is timber there or not? I am putting this to show your lordship that in reason there

1913

BOOTH v. THE KING.

Argument of Counsel.

must be some limitation fixed. It is a license with regard to cutting trees. Does it terminate *ipso facto* when the last tree is cut? Upon the unqualified and unlimited language of section 5 of the regulations, no; renewal goes on for ever; he may for purposes of his own desire to keep that license renewed, and if he does there is no discretion in the Crown to refuse it, it must be renewed forever. But your lordship has suggested, and my learned friend suggests, that no one would want it renewed after he has cut the last stick of timber. Well, does it mean the last stick? Is there no limitation on that view? Is there no point where the Crown or the Department have discretion to refuse? Because the right of the license holder, he having removed a large proportion of the timber, amounts to his holding up a large tract of land because there is some pine left upon it, although in the public interest it is desirable that the tract should be opened for settlement.

With regard to the other question: arising under the counterclaim. I think that perhaps arises—and your lordship has expressed an opinion against me—arises in this way, if your lordship will look at the language of the license for a moment; because after all the question as to the power of the Crown to contract is one thing; the question as to the form of the contract which they actually make is another.

As to the counterclaim, I do not think we can give evidence that on a certain date in 1891 certain trees were cut of a diameter less than nine inches. Except from the diameter which will appear from the different stumps, the diameter of the trees cut in each year after that being, as to a certain proportion of them, so small that they must have been less than nine inches in 1891.

1913

BOOTH
v.
THE KING.

Argument of Counsel.

If the renewals, which have been endorsed upon the license from year to year amount to a new license, and in order to comply with the true construction of the statute are to be construed as being a new license each year, then I would admit that a new license for instance, issued in 1907 or 1906, would carry with it the right to cut pine timber which in 1907 or 1906 was nine inches in diameter. (Cites per Moss, J., in the case of *Smylie v. The Queen*, (1). Upon the theory which I understand is the foundation of my learned friend's contention, that there was a contract in 1891 to grant a license for one year and further to renew that license from year to year indefinitely, then I say the true construction of that license means that the license in 1891 and all its renewals are licenses to cut timber which was nine inches in diameter in 1891 and no other timber. That is bound up with that contention. If our view of it is accepted, if there is a new license each year, then we would have no case on that counterclaim.

[THE COURT.—In other words, you say it was a grant in 1889 to cut specific trees which were then in existence of the diameter of nine inches, and if it is renewed from year to year it is a renewal of the old original contract which simply entitled them to cut that particular wood?]

Designated by that particular description, being timber then on the limit which was nine inches in diameter and upwards. The license itself, which was Exhibit No. 1, is in these terms:—"I do hereby give unto John R. Booth and his agents and workmen, full power and license to cut pine timber and saw logs from trees of not less than nine inches diameter at the stump. To hold and occupy

(1 27 O.A.R. 188.

1913

BOOTH v. THE KING.

Argument of Counsel.

the location to the exclusion of all others from 5th October, 1891, to 30th April, 1892, and no longer."

[THE COURT.—Supposing there was a tree eight and three quarter inches at the date of the license and that during the currency of the license it attained nine inches, would you contend he was not entitled to cut that?]

No, I think not, my lord.

[THE COURT.—It would be the trees as they stood at the date of the license; he would not be entitled to the growth during the year?]

If we imply a contract such as your lordship has suggested, at the time the agreement for a license was made with the licensee, you have the right to cut for one year and to have a renewal of that license indefinitely until the timber was removed, then I submit into that contract must be read the condition that it applied to the timber described therein being timber, at the date of the contract, of nine inches in diameter and no less. Of course my contention is that there is no such contract and no authority to make such a contract.

Mr. *Shepley* in reply.—My learned friend attributes to me the theory that in order to succeed in my main case I have to contend that there was a license running down by renewals all the time. I adopt for the purpose of my argument entirely the language my learned friend adopts from the judgment of the late Chief Justice Moss in *Smylie v. The Queen* (1), that in view of the law every one of these renewals—I was going to say *ex proprio vigore* but really it should be *ex vigore statuti*—has the form and effect of a new license, so that I am contending just as my learned friend does that every one of these renewals was a complete license by itself and authorized by virtue of the statute. It was the thing that was authorized to be given. It

(1) 27 O.A.R. at p. 188.

does not make any difference what form it took; it was a new license for another year and it was a license which empowered Mr. Booth to cut all the timber which during that year was of nine inches in diameter. And my learned friend does not pretend that Mr. Booth ever did anything more than that; he does not pretend that Mr. Booth ever cut a tree which at the time of its cutting was less than nine inches. He says he cut some trees which at the time of the cutting were more than nine inches but in 1891 would not have been found to be nine inches in diameter. It is a fanciful case, based upon a theory which I entirely repudiate, that these renewals, were renewals merely. I say that these renewals ,by force of the statute, had the force and effect of substantive new licenses each for a year from the time it was granted.

CASSELS, J., now (February 1st, 1913) delivered judgment.

This was a Petition of Right on behalf of John Rudolphus Booth. The suppliant sets forth in his petition that on the 5th October, 1891, a license was issued to him by the Superintendent-General of Indian Affairs to cut timber on Indian lands. The license was issued pursuant to the authority of chapter 43, of the Revised Statutes of Canada and amendments thereto. The suppliant alleges that the said license, since the date thereof, had been renewed from year to year, the last renewal expiring on the 30th April, 1909. He then alleges that due application for a renewal of the said license for the year ending on the 30th April, 1910, had been applied for which application was refused by the Superintendent-General; and the suppliant further alleges that the said limits and the timber aforesaid had been advertised for sale by his authority.

1913

BOOTH v. THE KING.

Reasons for Judgment.

The prayer of the petition is that the said sale may be restrained, and that the suppliant may be declared to be entitled to the renewal of the said license and to a renewal from year to year thereafter.

The Crown in its defence denies the right of the suppliant, and alleges among other grounds of defence that the lands comprised in the timber limits affected were in fact required for purposes incompatible with the licenses in question. There are other defences set out, which on reference to the statement of defence will appear.

The license bearing date the 5th of October, 1891, purports to be signed by Mr. Vankoughnet, the deputy of the Superintendent-General of Indian Affairs. It purports to be made pursuant to the provisions of Chapter 43 of the Revised Statutes of Canada and amendments thereto; and it gives to J. R. Booth of the City of Ottawa, his agents and workmen, full power and license to cut pine timber and saw logs from trees of not less than nine inches diameter at the stump upon the location described upon the back hereof; and to hold and occupy the said location to the exclusion of all others except as hereinafter mentioned, from the 5th October, 1891 to the 30th April, 1892, and no longer.

The license provides, among other things, that the dues to which the timber cut under its authority are liable shall be paid as follows: namely, as set forth in the regulations for the disposal of timber on Indian lands and reserves established by order of His Excellency the Governor-General in Council, dated the 15th September, 1888.

The amount payable for ground rent is mentioned as the sum of $324—the renewal fees, $2—and it provided that the above named licentiate shall be bound before or when paying the ground rent and

renewal fee, *if the license is renewed*, to declare on oath whether he is still the bona fide proprietor of the limit hereby licensed, or whether he has sold or transferred it or any part of it, or for whom he may hold it.

A series of renewals, so-called, were granted down to the 4th January, 1909; and they are practically all to the same effect namely, "that the conditions "of the within license having been complied with the "same is hereby renewed." Subsequently, certain manufacturing conditions were imposed by order in council of the 19th April, 1901, and the renewals were made subject to the manufacturing conditions. There is no objection to this term subsequently imposed, in order to conform apparently to regulations which had been provided for by the Province of Ontario in regard to licenses granted by them of timber berths owned by the Province.

No question arises in regard to the form of renewals. I will deal with this subject later on when discussing the various authorities bearing on the case. In point of fact "renewals" was the wrong term. There is no authority in chapter 43, R.S., referred to, or in any of the subsequent statutes which provided for renewals of licenses. Each so-called annual renewal was a new and independent license by itself.

The right of the suppliant to maintain his petition must depend upon whether or not a contract has been entered into between the Crown and himself entitling him to such renewal.

The statute, chapter 43 of the Revised Statutes of Canada, 1886, provides in the interpretation clause, that the expression "Superintendent-General," means Superintendent-General of Indian Affairs; and the expression "Deputy Superintendent-General" means the Deputy Superintendent-General of Indian Affairs.

1913

BOOTH v. THE KING.

Reasons for Judgment.

It is provided by section 43 of this statute that the Minister of the Interior, or the head of any other Department appointed for that purpose by the Governor in Council, shall be the Superintendent-General of Indian Affairs, and shall as such have the control and management of the lands and property of the Indians in Canada.

It is also provided that there shall be a Department of the Civil Service of Canada, which shall be called the Department of Indian Affairs, over which the Superintendent-General shall preside.

It is provided by section 14 of said statute that all reservations for Indians or for any band of Indians, or held in trust for their benefit, shall be deemed to be reserved and held for the same purposes as they were held before the passing of the Act and shall be subject to the provisions of this Act.

Section 41 of the statute provides that all Indian lands which are reserves or portions of reserves, surrendered or to be surrendered to Her Majesty, shall be deemed to be held for the same purposes as before the passing of this Act, and shall be managed leased and sold as the Governor in Council directs, subject to the conditions of surrender and the provisions of this Act.

Chapter 81 of the Revised Statutes of Canada, 1906, is practically similar to chapter 43, Revised Statutes of Canada, 1886. Section 15 of said chapter 43 provides that the Superintendent-General may authorize surveys, plans, and reports to be made of any reservation for Indians, showing and distinguishing the improved lands, the forest and lands fit for settlement, and such other information as is required, and may authorize the whole or any portion of a reserve to be sub-divided into lots.

1913

BOOTH
v.
THE KING.

Reasons for Judgment.

Section 20 of chapter 81, of the Revised Statutes of Canada, 1906, is in similar terms.

By chapter 81, section 48 of the R. S., 1906, it is provided that except as in this part otherwise provided no reserve or portion of a reserve shall be sold, alienated or leased, until it has been released or surrendered to the Crown for the purposes of this part.

By section 54 of chapter 43 of the Revised Statutes of 1886 (*The Indian Act*), it is provided as follows: "The Superintendent-General, or any officer or agent authorized by him to that effect, *may* grant licenses to cut trees on reserves and ungranted Indian lands at such rates and subject to such conditions, regulations and restrictions as are from time to time established by the Governor in Council, and such conditions, regulations and restrictions shall be adapted to the locality in which such reserves or lands are situate."

Section 55 provides that no license shall be so granted for a longer period than 12 months from the date thereof.

Then follow subsequent provisions as to making returns, etc.

Section, 73 and 74, of Chap. 81Q. R. S. 1906, and the following sections, are in similar terms to the earlier statute of 1886.

It is obvious that the Superintendent General or other officer authorized by him to that effect had no power to grant a license for a longer period than twelve months from the date thereof.

It is equally obvious that the conditions, regulations and restrictions referred to in section 54 of chapter 43, R. S., 1886, and of section 73 of chapter 81 of the R. S. of 1906, could only refer to such conditions, regulations and restrictions as are applicable to the yearly license, and would not include any such regulations which

1913

BOOTH
v.
THE KING.

Reasons for Judgment

contemplated a further renewal of the license to a period beyond the year referred to.

In point of fact the license of the 5th October, 1891, referred merely to the payment of the dues. It reads: "That the dues to which the timber cut under its "authority are liable shall be paid as follows, namely: "As set forth in the regulations for the disposal of "timber on Indian lands and reserves established by "order of His Excellency the Governor General in "Council, dated the 15th September, 1888."

I am of opinion that taking the license of the 5th October, 1891, by itself, and considering the authority conferred upon the Superintendent-General by section 54 of the earlier revision of the Revised Statutes, 1886, and section 73 of the later revision of 1906, there is no contract between the Crown and the suppliant which would entitle the suppliant to a judgment against the Crown as prayed for. The suppliant is therefore forced to rely upon the Indian land regulations and timber regulations adopted and established by orders of His Excellency the Governor General in Council on the 15th September, 1888, and to maintain his claim he must establish a contractual relation existing between the Crown and himself by reason of these regulations.

Section 2 of these regulations provides that the Superintendent-General of Indian Affairs, before granting any licenses for new timber berths in unsurveyed Indian reserves or lands; shall cause such berths to be surveyed; and the Superintendent-General of Indian Affairs may cause any reserve or other Indian lands to be sub-divided into as many timber berths as he may think proper. Then, there is a provision for sale by auction; and section 5 provides that license holders who shall have complied with all existing.

regulations shall be entitled to have their licenses renewed on application to the Superintendent-General of Indian Affairs.

Section 11 provides that all timber licenses are to expire on the 30th April next after the date thereof, and all renewals are to be applied for before the first of July following the expiration of the last preceding license. In default thereof the berth or berths shall be treated as, de facto, forfeited.

Section 12 provides that no renewal of any license shall be granted unless the limit covered thereby has been properly worked during the preceding season, or sufficient reason be given under oath and the same to be satisfactory to the Superintendent-General of Indian Affairs for the non-working of the limit; and unless or until the ground rent and all costs of survey and all dues to the Crown on timber, sawlogs or other lumber cut under and by virtue of any license other than the last preceding shall have been first paid.

Mr. Shepley, in his very able and lucid argument before me, rested his case in the main upon these regulations. His argument is shortly that while by the statute the Superintendent-General can only grant a license for a year, nevertheless the Crown might by valid contract bind itself to grant a renewal or a new license from year to year, practically in perpetuity. I am unable to agree with this contention. The lands in question are held in trust for the Indians. There are provisions referred to above which contemplate sales of Indian reserves by the Crown for the benefit of the Indians. I do not think the Crown was bound for all time to keep lands set apart as timber berths if in its discretion it was considered advisable in the interest of its *cestui que trustent* to sell these lands. In the present case it appears that a surrender was

1913

BOOTH v. THE KING.

Reasons for Judgment.

made with the view to enable the Crown to sell the limits in question. They were put up for sale by auction. There is nothing imputing want of good faith on the part of those representing the Crown, and I must assume that the Crown is dealing with the lands in question in a manner best calculated to promote the interest of those whom it represents.

Moreover, I have come to the conclusion that any regulation which would have the effect of tying up for practically all time the limits in question would if they are so construed be *ultra vires* as being contrary to the terms of the statute. The statute is that the Superintendent-General *may* grant licenses.

While I do not consider myself as bound to follow, with the exception of *Bulmer v. The Queen*, the various decisions which I shall refer to, they are the decisions of judges of very great eminence; and even if I held a view contrary to their views, I would be loth to set up my personal judgment as against their opinions, but would prefer to leave it to a higher court to place a different construction upon the statutes. I may say, however, that I agree with their conclusions.

The first case which is important is the case of *Contois v. Bonfield*, (1). This was an appeal from the judgment of the Court of Common Pleas. In this particular case a patent had been issued by mistake. It had been intended that the rights of the licensee to the timber should have been reserved to the licensee. The official of the Crown merely endorsed the reservation on the patent and it was held that this had no effect. An action was subsequently brought in the Chancery Division and tried by the late Chancellor Spragge in the suit of the *Attorney-General v. Contois*, (2).

(1) 27 U.C.C.P. 84. (2) 25 Gr. 346.

1913

BOOTH v. THE KING.

Reasons for Judgment.

The Contois case was decided under the Act respecting the sale and management of timber on public lands, chapter 23, of the Consolidated Statutes of Canada, 1859. That Act provided as follows: "The Commis- "sioner of Crown lands or any officer or agent under "him authorized to that effect *may* grant licenses to "cut timber on the ungranted lands of the Crown at "such rates, and subject to such conditions, regulations "and restrictions as from time to time be established "by the Governor in Council, and of which notice "shall be given in the *Canada Gazette*." By subsection 2 it was enacted that no licenses shall be so granted for a longer period than 12 months from the date thereof. And then follow provisions very similar in terms to the provisions of the statutes governing this case.

The late Chief Justice Thomas Moss, in his judgment, is reported as follows (p. 88) :—

"The patent on its face grants the land absolutely "and unconditionally. It may, therefore, be said to "grant more than the subject matter of the treaty "between the Crown and the patentees. This excess "in the grant may be fairly taken to have been the "result of an improvident act of the official whose "duty it was to draw a proper patent, and we are not "prepared to hold that in such a case the Crown "cannot in Equity obtain the relief which under "analogous circumstances would be awarded to a "subject. But we rest our judgment upon the ground "that, even if the memorandum endorsed had been "embodied in the patent, the appellant would, for all "that is alleged, have been without defence to this "action. On that supposition the language of the "patent would have been that it was subject to the "rights, powers, and privileges of the defendant under

1913

BOOTH v. THE KING.

Reasons for Judgment.

"the existing license." . . . . . .

"It was suggested upon the argument that the "difficulty arising from want of privity was met by "the commissioner's renewal of the license for the "period of a year, and that this should be treated as a "*quasi* assignment by the Crown of any rights which "could have been enforced against the plaintiff at its "instance. The answer offered to this was that the "powers of the commissioner are prescribed and "regulated by statute; that an agreement for a renewal "of a license is something which the law has not "empowered him to make, and is indeed not within "the contemplation of the statute; and that he can "only give a right to cut timber upon ungranted "lands, and even that for no longer period than twelve "months."

"These positions are fully supported by the statute."

In the case of *The Muskoka Mill and Lumber Co. v. McDermott, et al* (1)—also a case in the Court of Appeal for Ontario—the following is the language of the court. Osler, J. states at page 132, as follows:

"The Act respecting timber on public lands expressly "enacts that no license to cut timber on the ungranted "lands of the Crown shall be so granted for a longer "period than twelve months."

And he proceeds to point out the terms and the rights conferred upon the licensee. Then he states:

"No language could more forcibly express the "limitation of the right of the holder to the period of "the license, as well as the limitation of the period "for which it may be granted, and the license itself "is expressed, as it ought to be, in accordance with the "requirements of the Act. It is needless to say that "no conditions, regulations or restrictions can be

(1) 21 O.A.R. 129

"established by the Lieutenant-Governor in Council "which are opposed to these requirements. * * "The legal right of the licensee, except as excepted by "the last clause of section 2 of the Act, ceased with "the expiration of each license, and I am not aware of "any equitable right to a renewal capable of being "enforced against the Crown. That is a matter which "rests with the Crown, which no doubt will act justly "in each particular case. But there is nothing so far "as I know, to prevent the Crown from withdrawing "any lot from a timber limit, and declining to renew "the license over such lot at the expiration of the "license year."

Then he refers to the language of the late Chief Justice Moss in the case of *Contois v. Bonfield,* which I have quoted. The late Chief Justice Hagarty concurred with the judgment of Mr. Justice Osler.

The next case of importance is *Smylie v. The Queen,* decided by the late Mr. Justice Street, (1). This decision was based upon the contract entered into between the parties. The contention in that case was that the subsequent orders in council which required the timber to be manufactured in Canada were not binding upon the licensee. The judgment of Mr. Justice Street proceeded upon the ground that by the original contract the rights of the licensee to a renewal were subject to such regulations as may *from time to time* be established. The licensee refused to accept a renewal of the license containing the regulations requiring him to comply with these subsequent regulations, and Mr. Justice Street dismissed the action, basing his judgment upon the ground that the licensee, if he took a renewal was compelled to take it subject to these regulations, and having refused to do so he was out of court.

(1) 31 O. R. 203.

1913

BOOTH v. THE KING.

Reasons for Judgment.

I rather gather from the judgment of Mr. Justice Street that his own opinion would more than likely have been in favour of the right to a renewal. This case was taken to the Court of Appeal in Ontario, (1) and while the reasons of the various Judges may have been *obiter dicta*, nevertheless their views are entitled to very great weight. Mr. Justice Osler refers to the regulations —and amongst others is one that licensed holders who have duly complied with all existing regulations, shall be entitled to a renewal of their licenses on complying with certain conditions. He states at page 177 as follows:

"In these regulations we find for the first time "language which might imply an intention to take "authority to sell the timber berths or limits themselves "instead of, as hitherto, selling the yearly license to "cut the timber thereon, and stress was laid on this "by the appellant as if he had thereby acquired some "larger title to the timber than the yearly license "would confer upon him. We cannot, however, "assume that the Lieutenant-Governor in Council "intended to do anything opposed to the statute, "which only authorises the Commissioner of Crown "Lands to grant licenses to cut timber on the lands— "licenses which by law must expire at the expiration "of twelve months from their date. Such a license "was, in my opinion, the only thing authorized and "intended by these regulations to be sold, however "large the sum paid at the sale, which can only be "regarded as a premium or bonus for the license, as "indeed the conditions of sale in each case expressly "describe it. It may be that under the power to make "'conditions, regulations and restrictions,' the Lieu- "tenant-Governor in Council had authority to provide,

(1) 27 O.A.R. 176

"as these regulations purport to do, for renewing the "license on proper terms. It is not necessary to decide "that, although it does appear to be quite opposed to "the clear words of the Act, which seem to contemplate "that the Crown should be perfectly unfettered and "free to deal with the timber at the expiration of each "license year as it might think fit."

On page 181 he says:

"Considering, however, that every license is a new "and independent license."

Mr. Justice McLennan at page 182, refers to the various statutes, and he points out that "section 2 of "the statute declares that no license shall be so granted "for a longer period than twelve months from the "date thereof."

And he says:

"Now there is not, and there has never been, during "fifty years, any enactment in any way qualifying or "limiting that plain declaration of the Legislature, "that no license shall be for a longer term than twelve "months, and the law has been re-enacted during that "period three different times. How absolute the "intention of the Legislature was, and has been, in "thus limiting the duration of licenses, appears from "section 3, which defines the rights which the license "was intended to confer."

He proceeds (p. 183):—

"I think the Legislature could hardly have used "more clear, unambiguous, emphatic language to express "its intention, that there should be no license for a "longer period than twelve months, that at the end of "that time they should expire. * * They "have always been for a term not exceeding twelve "months, terminating on a day certain, which for "many years has been the 30th of April, and no longer.

1913

BOOTH v. THE KING.

Reasons for Judgment.

"Such is the language of the statute, and such is the "title which has been granted to and accepted by the "suppliants in pursuance thereof.

"They contend, however, that the clear language "of the Legislature and of the license issued in pur- "suance thereof, is to be qualified by the regulations, "particularly regulation 5, and by the practice of the "land department for many years of granting renewals "annually to the previous licensee. Regulation 5 "provides that license holders who have complied "with all existing regulations shall be entitled to have "their licenses renewed on application. * * "The question is whether these two regulations were "intended or can be held to weaken or qualify the "clear terms of the statute, and to confer a right not "expressed in the license itself, and I think it impossible "so to hold."

He then proceeds (p. 184):—

"I think, therefore, the intention of the regulations "is to comply with, and not to qualify, the statute. "But if the regulation is not in accordance with the "statute, if it assumes to confer a right of renewal, it "must give way to the statute, and can confer no right "beyond what the statute authorized the Land Com- "missioner to grant, and that is a license for a term "not exceeding twelve months. The regulations which "the Lieutenant-Governor in Council was authorized "to establish were in respect of licenses which were not "to exceed twelve months in duration. So far as they "go beyond that they cannot bind the Crown. I think "the regulations in question were ordained, merely "for the guidance of the officials of the land department, "and not for the purpose of conferring any contractual "or other right of renewal upon licensees, which they "could enforce against the Crown."

1913

BOOTH v. THE KING.

Reasons for Judgment.

The learned Judge came to the conclusion, as follows:

"I am, therefore, of the opinion that the suppliants "have no contractual or other right, as licensees, to "compel the Crown to renew their licenses."

The late Sir Charles Moss, at his death Chief Justice of the Court of Appeal, points out as follows (p. 189):

"These powers are prescribed and regulated by the "statute, and to it must recourse be had in every case "when it becomes necessary to ascertain what may "and what may not be done in regard to the public "timber. I fail to find in the statute any warrant for "the suppliants' contention. On the contrary, I "think it is made thereby very plain that the authority "to give or grant a right to any one to cut timber upon "the public lands of the Province for the purpose of "manufacturing it into logs, lumber, or square timber, "is limited to the grant of a license for a period of "twelve months from the date thereof.

"These enactments indicate an intention to retain "the entire right to and control over all timber not cut "during the term of a license, and over the grant of "licenses from year to year, and the power to withold "from the licensee of one year any claim whatever to "the issue to him of a license for the next or any future "year."

He further states (p. 190):

"The term 'renewal' seems to be applied to licenses "issued after the first. But in reality this is not an "accurate description. They are not in the nature "of a restoration or revival of a right. Each is a new "grant. It bears no necessary relation to the preceding "license."

In regard to this latter point, reference may be had to the case of *The Lakefield Lumber and Manufacturing*

1913

BOOTH
v.
THE KING.

Reasons for Judgment.

Co. v. Shairp, (1). Mr. Justice Gwynne in his judgment at page 671 states:

"As to the point that the license which issued on the "3rd May, 1888, was the same license as that issued "in all the years subsequent to and in the year 1873 "when the first appears to have been granted and "before the lot in question was sold, and that, therefore, "the license of 1888 covered the lot in question equally "as did that issued in 1883, and in prior years, it does "not seem to me to be necessary to make any observa-"tions further than that it cannot be entertained."

To the same effect in the Province of Quebec, in the case of *W. C. Edwards Co., Ltd., v. D'Halewyn*, (2)

The only other case that I have been referred to, and which has a bearing, is the case of *Bulmer v. The Queen*, reported in 3 Ex. C. R. at p. 184. At page 212, the late Judge of the Exchequer Court, Mr. Justice Burbidge, seems to have yielded to Mr. McCarthy's argument and read the word "may" as meaning the word "shall," and came to the conclusion there was a contract to renew. In that particular case it appeared subsequently that the Dominion had no right or title to the limits, the subject matter of the suit. The question therefore resolved itself into one of damages, the title not being in the Dominion, and the learned Judge proceeded to assess damages under the doctrine enunciated in *Bain v. Fothergill*, and allowed some $5,000 damages. This case was taken to the Supreme Court, and the judgment of that Court was pronounced by the late Chief Justice Strong, and is reported in 23 S. C. R. at p. 488. The court differed entirely from the view taken by the Judge in the court below. Apparently it declined to read the word "may" as "shall". And it is pointed out that by the words

(1) 19 S.C.R. p. 657 (2) 18 Q.B.K. p. 419

1913

BOOTH v. THE KING.

Reasons for Judgment.

of the statute the right conferred is discretionary. No valid cross appeal was taken so that the Supreme Court was unable to reduce the damages, and therefore dismissed the appeal. The case is important as showing that no contract had been entered into merely by the orders in council not acted upon by the granting of the license. The learned Chief Justice points out that the right of the suppliant must therefore depend upon the terms of the lease or license itself, and no contract was evidenced by the terms of the license.

One or two other cases were cited before me, as for instance *Booth v. McIntyre*, (1), *Foran v. McIntyre*, (2), and *McArthur v. The Northern and Pacific Junction Ry. Co.*, (3).

I have carefully read these various cases, but do not find that they assist in any way to a determination of this case.

I am of opinion for the reasons given that the suppliant has failed to prove a contract enforceable against the Crown.

The Petition is dismissed with costs.

Judgment accordingly.

Solicitors for the suppliant: *Christie, Greene, & Hill.*

Solicitor for the respondent: *E. L. Newcombe.*

(1) 31 U.C.C.P. p. 183 (2) 45 U.C.Q.B. p 283

(3) 17 O.A.R. p. 86